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Recent Case Law And Legislation Have Killed Patents

Law360, New York (February 11, 2014, 11:25 AM ET) -- Patents are dead. The careless rush to solve the "patent troll" problem has led to bad policy decisions. The unintended consequence of U.S. Supreme Court decisions and recent congressional action is to kill patents. The exclusivity afforded patents has been progressively diminished to the point that patents are no longer property. They are ever-more expensive, but offer ever-fewer rights. If the trend continues, there will be a significant negative impact on the U.S. economy.

Conventional justifications for obtaining patents no longer apply. Payment of the applicable fees and public disclosure, seemed a reasonable bargain for a time-limited monopoly. For a startup with a good idea, exclusivity — patent protection — was an important factor to obtain the funding necessary to develop the idea and grow a business. Investors want the comfort of knowing that if the idea is successful, they have a period of exclusivity during which they might earn a return on their investment.

The system worked fine prior to eBay Inc. v. MercExchange LLC, 547 US 388 (2006). A patent owner could sue an infringer and if a single claim was found to be infringed an injunction against continued infringement was virtually assured. U.S. Patent and Trademark Office operations were more than fully funded by user fees, and the fees seem justified in view of the benefits conferred. Not eight years later, official fees are up about 30 percent, and it is virtually impossible for a patent owner to obtain an injunction against continued infringement.

If they couldn't count on an injunction after eBay, at least patent owners could count on disgorging about 25 percent of infringers' unlawful revenues. As a general rule, unlawful patent infringers got to keep 75 percent, which hardly seems to grant exclusive rights, but at least 25 percent was a calculable expectation. That is until Uniloc USA Inc. v. Microsoft Corp., 632 F.3d 1292 (Fed.Cir. 2011) when the court held "as a matter of law that the 25 percent rule of thumb is a fundamentally flawed tool for determining a baseline royalty rate."

So, in a five-year span during which large tech companies piled up cash, patent owners lost not only the right to enjoin infringers but also the right to recover more than one quarter of their infringing revenue. Apportionment battles (see Bensen, Apportionment Of Lost Profits In Contemporary Patent Damage Cases, 10 VJOLT 8 (2005)) and a rising tide of challenges to expert testimony under Daubert v. Merrell Dow Pharms, 509 US 579 (1993) have continued to reduce recoverable patent infringement damages. And the number of damage appeals in patent cases has soared in recent years, as infringers have every reason to believe that the law is continuing to swing in favor of reduced royalty awards.

There are more examples of retroactive judicial indignities levied against patents, but suffice to say that since it is now virtually impossible to obtain an injunction or even reasonable compensation for

infringement, it's increasingly difficult to justify the escalating cost of obtaining and keeping a patent, much less pursuing an infringer. Exclusivity is all but illusory; never mind the constitutional recognition that: "The Congress shall have the power ... to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." US Const., Art. I, Sec. 8.

Much of the post-war U.S. economic success has been based on innovation secured by strong protection for intellectual property rights. Innovation alone is not enough. Innovation without protection just encourages copying. Copyists with lower manufacturing costs will destroy the market for any innovative product not protected by strong intellectual property laws. Innovation drives growth, but only when it benefits from strong intellectual property protection.

A 2012 U.S. Commerce Department report[1] concluded that 40 million jobs, or 28 percent of the U.S. workforce depends heavily on intellectual property. Nearly 35 percent of U.S. GDP comes from IP-intensive industries. Killing patents risks destroying our economic engine and puts our future prosperity at risk.

The inability of any patent owner to obtain either an injunction or significant damages discourages innovation by permitting IP theft. Why should copyists halt unlawful activity if the only penalty is possible payment of a small percentage royalty?

Even more troubling is that the bigger a company is the more incentive it has to infringe — so long as it earns more money infringing than it spends to defend the unlawful activity, there is no economic incentive to stop. If they can copy every competitor's innovation, there is no need for them to spend any money on research and development themselves. The trouble is that all competitors stop R&D spending as well for the same reasons, and innovation stalls. We will reduce patent litigation, but the price will be to remove all incentives to innovate, putting future prosperity at risk.

How did we get here without so much as a moment's debate about these vastly destructive policy decisions? Twin drivers have been the (1) crusade against "patent trolls" and (2) movement to wholly exempt software from patent protection. These policy initiatives have been vigorously supported by large tech companies. Their lobbying efforts have been rewarded to a frightening degree and the case law and legislation they have spawned has put us on a dangerous path. We may achieve short-term savings from reduced patent litigation, but at the steep cost of stalled innovation in the long term.

Based on its title, one might assume the America Invents Act, signed into law with much fanfare, would reverse the recent trend in the courts. Instead, the act gives an ax to wealthy corporations so they can cut themselves free of pesky patent infringement claims brought by small companies.

Inter partes review, which only the largest companies can afford, is a private right granted to wealthy infringers to effectively stop the infringement suit in its tracks and simultaneously command the resources of the USPTO against any company or inventor that might sue for infringement. The statutory presumption of validity is essentially tossed aside and the patent owner is required to prove validity a second time before it can proceed with its infringement claim. This strategy is being deployed in virtually every patent infringement dispute brought by a small company or inventor against a large company.

Far from the exclusivity originally envisioned, a patent is now nothing more than an ever-increasing expense with an ever-decreasing benefit. Even if a patent owner successfully runs the gauntlet to an infringement judgment, construction of the patent claims gets reviewed de novo under Markman v.

Westview Instruments Inc, 517 US 370 (1996) despite the right to trial by jury set out in Seventh Amendment to the U.S. Constitution.

De novo review means that every profitable infringer has an automatic appeal at which it might yet prevail on the infringement issue. No patent dispute is ever finally resolved. Patent owners not only have to prove validity twice to the patent office, but then they potentially have to prove infringement twice at consecutive federal trials. And these numerous changes to well-established patent law principles are all retroactive, applying to patents granted long ago just the same as to prospectively granted patents.

But wait, it may get worse for patents on both the legislative and judicial fronts. The U.S. Supreme Court has granted certiorari and will review the en banc decision in CLS Bank Int'l v. Alice Corp, 717 F.3d 1269 (Fed.Cir. 2013) regarding what test should be used to determine patent eligibility of a computer-implemented invention. Could this spell the end of any patent protection on software inventions? Yes, it could, and there are organized and well-funded lobbying efforts working toward just that result.

The large tech companies leading the war against patents are conflicted when it comes to software. We need look no further than their individual self-interest to understand why. On one side are the older companies with large software-patent portfolios. They are loathe to see the substantial value of these assets go to $0. It is enough patent reform for them if they can defang small companies and inventors that might sue them for infringement.

On the other side, though, are newer tech giants that have railed against software patents with nearly religious fervor since they were upstarts and who don't yet have significant patent portfolios. Killing patent suits by small companies and inventors is not enough reform for them; they also fear the software patent portfolios of large competitors with the means to pursue infringements. So, the new tech giants want to kill software patents completely to in order defend themselves against large competitors as well. The amicus briefs in CLS Bank will tell you who is who, but none of this has anything to do with "patent trolls."

For its part, the House passed H.R. 3309, "Innovation Act" (2013).[2] This bill is also seen as and reported to be an attempt to solve the "patent troll" problem, but strangely doesn't even define "patent troll." This fact alone should be enough to give us pause. Lobbying by the large tech companies has deftly taken advantage of the "patent troll" moniker to press its anti-patent agenda on a Congress-weary public.

Even a casual reading of the bill demonstrates that it applies to any patent owner who dares to file an infringement suit. Provisions would require patent owners (and possibly also their counsel) to pay infringers' patent fees if they lose. If patent ownership wasn't expensive enough, patent enforcement is now impossible for small companies and inventors. The obvious beneficiary of such a provision is not the public — it's the large tech companies that fear infringement suits from small companies and inventors. What lawyer will take a contingent fee case when they might have to pay the alleged infringer's legal fees if they lose the case?

This bill cements the large tech companies supporting the bill in place in their respective markets. How could any small company or inventor with disruptive technology ever dislodge them? The large companies will just steal the idea without any significant consequence. Is this the outcome we want? What the House intended? Patents are dead.

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[1] See http://www.esa.doc.gov/Reports/intellectual-property-and-us-economy-industries-focus.

[2] See beta.congress.gov/bill/113th/house-bill/3309.
